

(4) DRB documents made available for public inspection and copying shall be located in the Armed Forces Discharge Review/Correction Board Reading Room. The documents shall be indexed in a usable and concise form so as to enable the public, and those who represent applicants before the DRBs, to isolate from all these decisions that are indexed, those cases that may be similar to an applicant's case and that indicate the circumstances under or reasons for (or both) which the DRB or the Secretary concerned granted or denied relief.

(i) The reading file index shall include, in addition to any other items determined by the DRB, the case number, the date, character of, reason and authority for the discharge. It shall also include the decisions of the DRB and reviewing authority, if any, and the issues addressed in the statement of findings, conclusions, and reasons.

(ii) The index shall be maintained at selected permanent locations throughout the United States. This ensures reasonable availability to applicants at least 30 days before a traveling panel review. A list of these locations shall be published in the FEDERAL REGISTER by the Department of the Army. The index shall also be made available at sites selected for traveling panels or hearing examinations for such periods as the DRB or a hearing examiner is present and in operation. An applicant who has requested a traveling panel review or a hearing examination shall be advised in the notice of such review of the permanent index locations.

(iii) The Armed Forces Discharge Review/Correction Board Reading Room shall publish indexes quarterly for all DRBs. All DRBs shall be responsible for timely submission to the Reading Room of individual case information required for update of the indexes. In addition, all DRBs shall be responsible for submission of new index categories based upon published changes in policy, procedures, or standards. These indexes shall be available for public inspection or purchase (or both) at the Reading Room. When the DRB has accepted an application, information concerning the availability of the index shall be provided in the DRB's response to the application.

(iv) Copies of decisional documents will be provided to individuals or organizations outside the NCR in response to written requests for such documents. Although the Reading Room shall try to make timely responses to such requests, certain factors such as the length of a request, the volume of other pending requests, and the impact of other responsibilities of the staff assigned to such duties may cause some delays. A fee may be charged for such documents under appropriate DoD and Department of the Army directives and regulations. The manual that accompanies the index of decisions shall notify the public that if an applicant indicates that a review is scheduled for a specific date, an effort will be made to provide requested decisional documents before that date. The individual or organization will be advised if that cannot be accomplished.

(v) Correspondence relating to matters under the cognizance of the Reading Room (including requests for purchase of indexes) shall be addressed to: DA Military Review Boards Agency, Attention: SFBA (Reading Room), Room 1E520, The Pentagon, Washington, DC 20310.

(m) *Privacy Act information.* Information protected under the Privacy Act is involved in the discharge review functions. The provisions of part 286a of this title shall be observed throughout the processing of a request for review of discharge or dismissal.

(n) *Information requirement.* Each Military Department shall provide the Deputy Assistant Secretary of Defense (Military Personnel and Force Management) DASD (MP&FM), Office of the ASD (MRA&L), with a semiannual report of discharge review actions in accordance with § 70.11.

[47 FR 37785, Aug. 26, 1982, as amended at 48 FR 9855, Mar. 9, 1983; 48 FR 35644, Aug. 5, 1983]

#### § 70.9 Discharge review standards.

(a) *Objective of review.* The objective of a discharge review is to examine the propriety and equity of the applicant's discharge and to effect changes, if necessary. The standards of review and the underlying factors that aid in determining whether the standards are met shall be historically consistent with criteria for determining honorable

service. No factors shall be established that require automatic change or denial of a change in discharge. Neither a DRB nor the Secretary of the Military Department concerned shall be bound by any methodology of weighting of the factors in reaching a determination. In each case, the DRB or the Secretary of the Military Department concerned shall give full, fair, and impartial considerations to all applicable factors before reaching a decision. An applicant may not receive a less favorable discharge than that issued at the time of separation. This does not preclude correction of clerical errors.

(b) *Propriety.* (1) A discharge shall be deemed proper unless, in the course of discharge review, it is determined that:

(i) There exists an error of fact, law, procedure, or discretion associated with the discharge at the time of issuance; and that the rights of the applicant were prejudiced thereby (such error shall constitute prejudicial error if there is substantial doubt that the discharge would have remained the same if the error had not been made); or

(ii) A change in policy by the Military Service of which the applicant was a member, made expressly retroactive to the type of discharge under consideration, requires a change in the discharge.

(2) When a record associated with the discharge at the time of issuance involves a matter in which the primary responsibility for corrective action rests with another organization (for example, another Board, agency, or court), the DRB will recognize an error only to the extent that the error has been corrected by the organization with primary responsibility for correcting the record.

(3) The primary function of the DRB is to exercise its discretion on issues of equity by reviewing the individual merits of each application on a case-by-case basis. Prior decisions in which the DRB exercised its discretion to change a discharge based on issues of equity (including the factors cited in such decisions or the weight given to factors in such decisions) do not bind the DRB in its review of subsequent cases because no two cases present the same issues of equity.

(4) The following applies to applicants who received less than fully Honorable administrative discharges because of their civilian misconduct while in an inactive reserve component and who were discharged or had their discharge reviewed on or after April 20, 1971: the DRB shall either recharacterize the discharge to Honorable without any additional proceedings or additional proceedings shall be conducted in accordance with the Court's Order of December 3, 1981, in *Wood v. Secretary of Defense* to determine whether proper grounds exist for the issuance of a less than Honorable discharge, taking into account that;

(i) An Other than Honorable (formerly undesirable) Discharge for an inactive reservist can only be based upon civilian misconduct found to have affected directly the performance of military duties;

(ii) A General Discharge for an inactive reservist can only be based upon civilian misconduct found to have had an adverse impact on the overall effectiveness of the military, including military morale and efficiency.

(c) *Equity.* A discharge shall be deemed to be equitable unless:

(1) In the course of a discharge review, it is determined that the policies and procedures under which the applicant was discharged differ in material respects from policies and procedures currently applicable on a Service-wide basis to discharges of the type under consideration provided that:

(i) Current policies or procedures represent a substantial enhancement of the rights afforded a respondent in such proceedings; and

(ii) There is substantial doubt that the applicant would have received the same discharge if relevant current policies and procedures had been available to the applicant at the time of the discharge proceedings under consideration.

(2) At the time of issuance, the discharge was inconsistent with standards of discipline in the Military Service of which the applicant was a member.

(3) In the course of a discharge review, it is determined that relief is warranted based upon consideration of the applicant's service record and other evidence presented to the DRB viewed

in conjunction with the factors listed in this section and the regulations under which the applicant was discharged, even though the discharge was determined to have been otherwise equitable and proper at the time of issuance. Areas of consideration include, but are not limited to:

(i) Quality of service, as evidenced by factors such as:

(A) Service history, including date of enlistment, period of enlistment, highest rank achieved, conduct or efficiency ratings (numerical or narrative);

(B) Awards and decorations;

(C) Letters of commendation or reprimand;

(D) Combat service;

(E) Wounds received in action;

(F) Records of promotions and demotions;

(G) Level of responsibility at which the applicant served;

(H) Other acts of merit that may not have resulted in a formal recognition through an award or commendation;

(I) Length of service during the service period which is the subject of the discharge review;

(J) Prior military service and type of discharge received or outstanding postservice conduct to the extent that such matters provide a basis for a more thorough understanding of the performance of the applicant during the period of service which is the subject of the discharge review;

(K) Convictions by court-martial;

(L) Records of nonjudicial punishment;

(M) Convictions by civil authorities while a member of the Service, reflected in the discharge proceedings or otherwise noted in military service records;

(N) Records of periods of unauthorized absence;

(O) Records relating to a discharge instead of court-martial.

(ii) Capability to serve, as evidenced by factors such as:

(A) *Total capabilities*. This includes an evaluation of matters, such as age, educational level, and aptitude scores. Consideration may also be given whether the individual met normal military standards of acceptability for military service and similar indicators

of an individual's ability to serve satisfactorily, as well as ability to adjust to military service.

(B) *Family and Personal Problems*. This includes matters in extenuation or mitigation of the reason for discharge that may have affected the applicant's ability to serve satisfactorily.

(C) *Arbitrary or capricious action*. This includes actions by individuals in authority that constitute a clear abuse of such authority and that, although not amounting to prejudicial error, may have contributed to the decision to discharge or to the characterization of service.

(D) *Discrimination*. This includes unauthorized acts as documented by records or other evidence.

#### **§ 70.10 Complaints concerning decisional documents and index entries.**

(a) *General*. (1) The procedures in this section—are established for the sole purpose of ensuring that decisional documents and index entries issued by the DRBs of the Military Departments comply with the decisional document and index entry principles of this part.

(2) This section may be modified or supplemented by the DASD(MP&FM).

(3) The following persons may submit complaints:

(i) A former member of the Armed Forces (or the former member's counsel) with respect to the decisional document issued in the former member's own case; and

(ii) A former member of the Armed Forces (or the former member's counsel) who states that correction of the decisional document will assist the former member in preparing for an administrative or judicial proceeding in which the former member's own discharge will be at issue.

(4) The Department of Defense is committed to processing of complaints within the priorities and processing goals set forth in paragraph (d)(1)(iii) of this section. This commitment, however, is conditioned upon reasonable use of the complaint process under the following considerations. The DRBs were established for the benefit of former members of the Armed Forces. The complaint process can aid such persons most effectively if it is used by